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No. _____

IN THE

Supreme Court of the United States

October Term, 1984

RAYMOND J. EVEN,

Petitioner,

vs.

NATIONAL GUARD BUREAU and
MAJOR GENERAL JOHN A. JOHNSTON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CLYDE B. PRITCHARD
1930 Buhl Building
Detroit, MI 48226
(313) 965-1215
Counsel of Record

MARK A. GOLDSMITH
755 W. Big Beaver
Suite 2323
Troy, MI 48084
(313) 362-3030

Attorneys for Petitioner

Interstate Brief & Record Co., Suite 731, David Whitney Building, Detroit, MI 48226
(313) 962-8765

38 pp

QUESTIONS PRESENTED

I.

WHETHER PETITIONER'S SEPARATION FROM THE AIR NATIONAL GUARD, WITHOUT PROCEDURAL DUE PROCESS, CONSTITUTES A MILITARY DECISION THAT MAY NOT BE REVIEWED IN A FEDERAL COURT.

II.

WHETHER A FACTUAL DISPUTE, CONCERNING THE MUTUAL UNDERSTANDING THAT PETITIONER ALLEGES GIVES RISE TO HIS PROPERTY INTEREST IN HIS CONTINUED EMPLOYMENT, SHOULD HAVE PRECLUDED SUMMARY JUDGMENT ON HIS DUE PROCESS CLAIM TO PROCEDURAL FAIRNESS.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iv
Opinion Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ:	
I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER PETITIONER'S SEPARATION FROM THE AIR NATIONAL GUARD, WITHOUT PROCEDURAL FAIRNESS, IS A DECISION THAT MAY BE REVIEWED IN A FEDERAL COURT.	6
II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A FACTUAL DISPUTE, CONCERNING THE MUTUAL UNDERSTANDING THAT PETITIONER ALLEGES GIVES RISE TO HIS PROPERTY INTEREST IN HIS CONTINUED EMPLOYMENT, SHOULD HAVE PRECLUDED SUMMARY JUDGMENT ON HIS DUE PROCESS CLAIM TO PROCEDURAL FAIRNESS.	9
Conclusion	11
Appendix A: Judgment of the United States District Court for the Eastern District of Michigan, dated March 29, 1983, Granting Respondents' Motion For Summary Judgment	A-1

Page

Appendix B: Memorandum Opinion of the United States District Court for the Eastern District of Michigan, dated March 29, 1983, Granting Respondents' Motion For Summary Judgment B-1

Appendix C: Opinion of the United States Court of Appeals for the Sixth Circuit, dated March 23, 1984, Affirming the District Court C-1

Appendix D: Order of the United States Court of Appeals for the Sixth Circuit, dated May 3, 1984, Denying Petitioner's Petition For Rehearing D-1

Appendix E: Air National Guard Regulation 36-06 E-1

Appendix F: PL 85-861, § 28, 72 Stat. 1562 (1958) (uncodified) F-1

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress and Company*, 398 U.S. 144 (1970) 10

Board of Education, Island Trees Union Free School District No. 26 v. *Pico*, 457 U.S. 853 (1982) . . 10

Chappell v. *Wallace*, 103 S.Ct. 2362 (1983) 6

Dillard v. *Brown*, 652 F.2d 316 (3rd Cir. 1981) . . 8, 9

Gilligan v. *Morgan*, 413 U.S. 1 (1978) 6

Hill v. *City of Philadelphia*, 86 F.R.D. 75 (E.D. Pa. 1980) 10

Lindenau v. *Alexander*, 663 F.2d 68 (10th Cir. 1981) 7

Mindes v. *Seaman*, 453 F.2d 197 (5th Cir. 1971) 7, 8

Page

Neiszner v. *Mark*, 684 F.2d 562 (8th Cir. 1982), *cert. denied*, 103 S.Ct. 1273 (1983) 7

Orloff v. *Willoughby*, 345 U.S. 83 (1953) 7, 8

Pauls v. *Secretary of the Air Force*, 457 F.2d 294 (1st Cir. 1972) 7

Perry v. *Sindermann*, 408 U.S. 593 (1972) 5

Scheuer v. *Rhodes*, 416 U.S. 232 (1974) 7

Schlesinger v. *Ballard*, 419 U.S. 498 (1975) 7

Wallace v. *Chappell*, 661 F.2d 729 (9th Cir. 1981), *reversed on other grounds*, 103 S.Ct. 2362 (1983) 7

Whitaker v. *Board of Higher Education of the City of New York*, 461 F.Supp. 99 (E.D. N.Y. 1978) . . 10

Statutes:

U.S. Const. Amend. V 2

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 3

32 U.S.C. § 709(e)(1)(1968) 2, 3

PL 85-861, § 28, 72 Stat. 1562 (1958) (uncodified) 3, 5

Rule and Regulation:

F. R. Civ. P. 56(c) 2, 9

ANGR 36-06 . . . . . 3, 4, 5

Page

Additional Authority:

Haggerty, *Judicial Review of Military Administrative Decisions*, 3 Hastings Const. L.Q. 171 (1976) 7

6 Pt. 2 Moore's Federal Practice ¶ 56.17[10] (1982) 10

Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2732.2 (1983) 10

No. _____

IN THE

Supreme Court of the United States

October Term, 1984

RAYMOND J. EVEN,
Petitioner,

vs.

NATIONAL GUARD BUREAU and
MAJOR GENERAL JOHN A. JOHNSTON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Your Petitioner, RAYMOND J. EVEN, prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review its judgment and opinion entered in this proceeding on March 23, 1984.

OPINION BELOW

The opinion of the Court of Appeals was not reported, but appears in Appendix C hereto. The opinion of the District Court was not reported, but appears in Appendix B hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 23, 1984. A timely petition for rehearing was denied on May 3, 1984. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V:

> No person shall . . . be deprived of life, liberty, or property without due process of law . . . .

32 U.S.C. § 709(e)(1)(1968):

> Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned —
>
> (1) A technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the Adjutant General of the jurisdiction concerned.

F. R. Civ. P. 56(c):

> The judgment sought shall be rendered forthwith if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.

Air National Guard Regulation 36-06:

The text is set forth in Appendix E.

PL 85-861, § 28, 72 Stat. 1562 (1958) (uncodified):

The text is set forth in Appendix F.

STATEMENT OF THE CASE

Invoking jurisdiction under 28 U.S.C. § 1331, Petitioner Raymond J. Even filed the instant action alleging that his termination as a Colonel and as a civilian technician in the Michigan Air National Guard violated his rights to procedural due process under the Fifth Amendment. The United States District Court for the Eastern District of Michigan granted Respondents' Motion for Summary Judgment on the ground that the case involved a non-reviewable military decision. The United States Court of Appeals for the Sixth Circuit affirmed on that basis, and on the alternate ground that Colonel Even had no protectible property interest in his continued employment in the military.

From 1954 until his termination in 1981, Colonel Even enjoyed the dual status of being a Colonel in the Michigan Air National Guard and a civilian technician. Under the National Guard Technician's Act, 32 U.S.C. § 709(e)(1)(1968), civilian technicians are required to maintain their commission with the National Guard. If they are separated from the Guard, they must be promptly separated from their civilian technician employment.

Air National Guard Regulation (ANGR) 36-06 provides that every officer who has attained 20 years in service must be reviewed by a selective retention advisory board to consider whether he should be retained on active status. The person being reviewed has no right to appear before the board; no right to present evidence in his behalf; no right to confront any witnesses against him; no

right to challenge the evidence presented against him; and no right to receive written findings of the board.

In April 1981, Colonel Even was subjected to review by a selective retention advisory board, which recommended that he not be retained on active status. Having lost his commission in the Guard, Colonel Even was automatically terminated from his position as a civilian technician. The concomitant damage, in direct pay loss and pension benefits, approaches $250,000.

This substantial deprivation of benefits was accomplished despite a mutual understanding between the technicians, the Guard and the Air Force that a certain class of technicians — those employed as technicians before July 1, 1955 — would not be terminated before age 60, so long as they qualified militarily and were technically competent. This understanding was reached in 1955, long before the promulgation of ANGR 36-06 in 1967.

This understanding was confirmed in an opinion by the legal advisor to the National Guard Bureau, circulated to the Adjutants General of all states on August 21, 1970:

> It is therefore the opinion of this office that Air National Guard officer technicians who have been continuously employed since 30 June 1955 . . . may not be involuntarily removed from an active status before becoming 60 years of age except for cause, physical disability, or because of being twice passed over for promotion to the grade of captain, major or lieutenant colonel.*

This shared view of the National Guard Bureau and the Air Force is further evidenced by a letter from the Air

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* The opinion was discovered after oral argument in the Court of Appeals. Appended to the Petition for Rehearing, it was before that Court when it denied that Petition.

Force Chief of Staff to the Secretary of the Air Force, dated January 24, 1973:

> These officers [technicians] have been under the impression since 1 July 1955 that Section 28, Public Law 85-861 assured them of retention in their civilian employment until age 60. This opinion also prevailed in the National Guard Bureau and the Air Force . . . In light of the policy followed over the past 17 years under the presumed authority of PL 85-861, I recommend that where the officer is fully qualified to hold his military position and properly performing his technician job he should be retained in his technician employment.**

The recommendation contained in the letter was, in turn, endorsed by the Secretary of the Air Force.

The Court of Appeals rejected Colonel Even's claim to a protectible property interest in his continued military employment under *Perry* v. *Sindermann*, 408 U.S. 593 (1972), because one of the communications upon which he relies — the letter of January 24, 1973 — states that a pre-1955 technician may not be discharged until age 60, so long as he remains "fully qualified to hold his military position." The Court interpreted the term "qualified" to mean that Colonel Even would have to survive review under ANGR 36-06, even though Colonel Even contended the term "qualified" only meant competent to perform his military duties.

** The "presumed authority of PL 85-861" refers to Amendments to the Reserve Officers Personnel Act, 72 Stat. 1562 (1958) (uncodified). The technicians, Air Force and Guard believed that § 28 of that Act mandated tenure for the technicians until age 60, until the Air Force Judge Advocate General ruled on October 13, 1972 that such an interpretation was erroneous. The letter of the Air Force Chief of Staff, dated January 24, 1973, reflects an intent to retain the policy, even though it was no longer believed to be required by the terms of the statute.

Despite a factual dispute as to the meaning of that letter, in particular, and the nature of the understanding between the Guard and the technicians, in general, the Court of Appeals upheld summary judgment against Colonel Even, on the ground that the letter demonstrated that he had no property interest protectible under the due process clause. And, without articulating how Colonel Even's request for procedural fairness would interfere with the military, the lower courts held that his separation constituted a non-reviewable military decision.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER PETITIONER'S SEPARATION FROM THE AIR NATIONAL GUARD, WITHOUT PROCEDURAL FAIRNESS, IS A DECISION THAT MAY BE REVIEWED IN A FEDERAL COURT.

By granting certiorari, this Court can resolve a substantial federal question concerning the reviewability of military decisions — an area that currently lacks doctrinal and decisional coherence. Although this Court has recently reiterated the principle that "military personnel are [not] barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service," *Chappell* v. *Wallace*, 103 S.Ct. 2362, 2367 (1983), it has not made explicit the relevant tests for determining which military decisions are beyond the pale of reviewability.

Because of the absence of firm guidelines, the lower courts must rely on the discrete holdings of this Court's prior decisions, which do not easily yield unifying principles of reviewability. Thus, when this Court in *Gilligan* v. *Morgan*, 413 U.S. 1 (1978), held that a federal court should

not review claims involving, *inter alia*, the composition of the Ohio National Guard, in *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), it upheld review of a decision by the Adjutant General of the Ohio National Guard to deploy units on a university campus. Similarly, while this Court held in *Orloff* v. *Willoughby*, 345 U.S. 83 (1953), that there could be no review of a serviceman's claim to discriminatory treatment in duty assignments, in *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), it held reviewable an officer's claim that he had been unconstitutionally discharged from the Navy. From the maze of cases one scholar concludes:

> No systematic theory exists to guide courts through the whether's and how's of this very delicate subject, and the relevant decisions are in disarray.

Haggerty, *Judicial Review of Military Administrative Decisions*, 3 Hastings Const. L.Q. 171 (1976).

Without a definitive pronouncement from this Court, the Courts of Appeal have adopted conflicting approaches. The Fifth Circuit enunciated a test in *Mindes* v. *Seaman*, 453 F.2d 197 (1971), requiring a federal court to consider four factors in determining whether a military decision is reviewable: the nature and strength of plaintiff's challenge to the military decision; the potential injury to plaintiff if review is refused; the type and degree of anticipated interference with the military function; the extent to which the exercise of military expertise or discretion is involved. The *Mindes* test was adopted by the courts below in the instant case, as it has been by other circuits. *Pauls* v. *Secretary of the Air Force*, 457 F.2d 294 (1st Cir. 1972); *Neiszner* v. *Mark*, 684 F.2d 562 (8th Cir. 1982), *cert. denied*, 103 S.Ct. 1273 (1983); *Wallace* v. *Chappel*, 661 F.2d 729 (9th Cir. 1981), *reversed on other grounds*, 103 S.Ct. 2362 (1983); *Lindenau* v. *Alexander*, 663 F.2d 68 (10th Cir. 1981).

However, the *Mindes* test has been expressly repudiated by the Third Circuit, in *Dillard* v. *Brown*, 652 F.2d 316 (1981). The Third Circuit reasoned that this Court has carved out two exceptions to the general rule that military decisions are reviewable: where continuing court supervision of the military is involved, as in *Gilligan*, and where non-constitutional, non-statutory objections based simply on discriminatory treatment are raised, as in *Orloff*. Where such exceptions are inapplicable, the Third Circuit would review the claim on the merits, rather than engage in a factor analysis of justiciability:

> The difficulty which we perceive with the *Mindes* analysis is that it intertwines the concept of justiciability with the standards to be applied to the merits of the case. As we have pointed out, the Supreme Court in both *Gilligan* and *Orloff* has established the basic parameters for determining the justiciability of challenges brought against the military. Once a claim falls within these parameters, a court should review the claim on the merits. Even if such a constitutional challenge appears weak or frivolous, jurisprudentially that claim should be rejected on the merits, rather than deemed to be non-justiciable by a federal court. We prefer an analysis which does not mingle concepts of justiciability with those affecting the merits of the claim to the extent that *Mindes* requires. Thus, we decline to adopt the Fifth Circuit's formula.

Id. at 323.

Though both the *Mindes* and *Dillard* approaches demonstrate judicial deference to the military, they diverge as to the procedural posture at which the deference should be accorded. The *Mindes* test involves a

factor analysis, which accounts for military discretion, without a fully developed record, before determining whether a claim is judicially reviewable at all. The *Dillard* principle permits full factual development in adjudicating a claim, but recognizes that the contours of the claim will, necessarily, be affected by the unique status of the military.

These irreconcilable approaches reflect the lower courts' search for coherence in the area of the reviewability of military decisions. Certiorari in the instant case provides an opportunity to bring guidance and harmony to the circuits on a question that requires both.

II.

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A FACTUAL DISPUTE, CONCERNING THE MUTUAL UNDERSTANDING THAT PETITIONER ALLEGES GIVES RISE TO HIS PROPERTY INTEREST IN HIS CONTINUED EMPLOYMENT, SHOULD HAVE PRECLUDED SUMMARY JUDGMENT ON HIS DUE PROCESS CLAIM TO PROCEDURAL FAIRNESS.

By granting certiorari, this Court can address the substantial federal question touching on the propriety of granting summary judgment against a constitutional claim, where there is a dispute between the parties as to the mutual understanding that the claimant alleges gives rise to the property interest.

This Court has shown particular care that constitutional claims not be foreclosed on motions for summary judgment, under F. R. Civ. P. 56(c), where there exists any possible dispute as to material facts. As Professor Moore has stated:

> Constitutional and other questions of a large public import should not be decided on an inadequate

> factual basis. Hence where the record is inadequate for the constitutional question presented or there are genuine factual issues, a motion for summary judgment should be denied.

6 Pt. 2 Moore's Federal Practice ¶ 56.17[10] (1982). *Accord*, Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2732.2 (1983).

This aversion to disposition of constitutional claims on summary judgment was demonstrated in *Adickes* v. *S.H. Kress and Company*, 398 U.S. 144 (1970), where this Court carefully reviewed the depositions, affidavits and pleadings in holding that disputed fact issues precluded granting summary judgment against plaintiff's claim that she had been deprived of her civil rights on racial grounds. Similarly, in *Board of Education, Island Trees Union Free School District No. 26* v. *Pico*, 457 U.S. 853 (1982), this Court reviewed affidavits and other evidentiary materials in determining that summary judgment was not appropriate, because factual disputes inhered in plaintiff's First Amendment claims.

Although this Court has not addressed this issue in the procedural due process context, some lower courts have adopted this heightened sensitivity in the procedural due process area. *See, e.g., Hill* v. *City of Philadelphia*, 86 F.R.D. 75 (E.D. Pa. 1980) (factual dispute as to parties' understanding concerning job status precluded summary judgment as to employee's property interest in continued employment); *Whitaker* v. *Board of Higher Education of the City of New York*, 461 F.Supp. 99 (E.D. N.Y. 1978) (factual dispute concerning teacher and school board's understanding as to tenure precluded summary judgment against teacher's claim to tenure).

The decision of the courts below in the instant case is a clear departure from the accepted principles reflected in

the above authorities. Because it is contrary to the scrutiny required by this Court for summary disposition of constitutional claims, review by this Court will make plain to the lower courts that all constitutional claims — whether involving race, free speech or procedural due process — require equally sensitive treatment on summary judgment motions.

CONCLUSION

For all of the above reasons, Petitioner Raymond J. Even requests this Court grant certiorari.

Respectfully submitted,

CLYDE B. PRITCHARD
1930 Buhl Building
Detroit, Michigan 48226
(313) 965-1215
Counsel of Record

MARK A. GOLDSMITH
755 W. Big Beaver, Suite 2323
Troy, Michigan 48084
(313) 362-3030

Attorneys for Petitioner
Raymond J. Even

Dated: July 26, 1984

APPENDICES

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APPENDIX A

JUDGMENT

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Filed March 29, 1983)

(Raymond J. Even, Plaintiff, v. National Guard Bureau, et al., Defendants — Civil No. 82 71970)

This matter having come before the court on cross motions for summary judgment, and the court having entered its Memorandum Opinion,

Now, Therefore, It Is Ordered And Adjudged

that defendants' motion for summary judgment be and the same hereby is Granted and plaintiff's complaint is hereby Dismissed.

Dated at Detroit, Michigan, this 29th day of March 1983.

/s/ Robert E. DeMascio
United States District Judge

APPENDIX B

MEMORANDUM OPINION

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Filed March 29, 1983)

(Raymond J. Even, Plaintiff, v. National Guard Bureau, et al., Defendants — Civil No. 82 71970)

Plaintiff's complaint alleges that the circumstances of his discharge from his position as a Colonel and a civil service technician in the Michigan Air National guard violated his right to due process. The parties have filed cross motions for summary judgment. The defendants, National Guard Bureau and Major General John A. Johnson, contend that plaintiff's claims are barred by the doctrine of sovereign immunity; that the decision to release plaintiff is a military decision that is not reviewable by the courts; and that plaintiff did not have a protectable property interest in continued employment with the Michigan Air National Guard.

Plaintiff has been a member of the Michigan National Guard since 1947. In 1954, he obtained a position as a civilian "caretaker." In 1968, an act of Congress placed the position under federal civil service and changed its title from "caretaker" to "technician." Under the act, plaintiff was required to maintain his membership in the National Guard in order to retain his position as a civilian technician. *See* 32 U.S.C. § 709 (b), (d), (e). Plaintiff's continued membership in the Michigan National guard was subject to ANG Reg. 36-05. That regulation provides that after an officer completes twenty years in federal service, his retention in the Air National Guard is subject to

yearly review by a Vitalization Board. ANG Reg. 36-06. In 1981, plaintiff was reviewed for retention by a Vitalization Board convened by the defendant Adjutant General. The Board recommended that the plaintiff not be retained. As the regulations require, the Adjutant General then forwarded plaintiff's name to the Chief of the National Guard who withdrew federal recognition of plaintiff's commission. As a result, plaintiff was honorably discharged from the Michigan Air National Guard and transferred in grade to the Air Force Reserve. Pursuant to the provision of 32 U.S.C. § 709(e) (1), plaintiff was terminated from his civilian technician position.

As a general rule, courts will not review military decisions. *Orloff* v. *Willoughby*, 345 U.S. 83, 93-4 (1953). *See also Schlesinger* v. *Ballard*, 419 U.S. 498, 510 (1975). However, two exceptions exist to this rule. Courts will review allegations that military procedure violates the constitution or that the military has violated its own regulations. *Mindes* v. *Seaman*, 453 F.2d 197, 200 (5th Cir. 1977); *O'Mara* v. *Zebrowski*, 447 F.2d 1085, 1087 (3rd Cir. 1971); *Bluth* v. *Laird*, 435 F.2d 1065, 1071 (4th Cir. 1970). Here, plaintiff's only claim is that defendant's decision to discharge him violated his constitutional right to due process. Even though plaintiff does allege a constitutional violation, we would not automatically review the military decision. *See Mindes* v. *Seaman*, 453 F.2d at 201. Rather, we would balance the interests involved and consider (1) "[t]he nature and strength of plaintiff's challenge to the military determination; (2) "[t]he potential injury to the plaintiff if review is refused." (3) "[t]he type and degree of anticipated interference with the military function;" and (4) "[t]he extent of anticipated interference with the military function." *Id.* In *Turner* v. *Egan*, 358 F. Supp. 560 (D. Alaska 1973), *aff'd* 414 U.S. 1105 (1973), the court applied these considerations to facts quite similar to those

in this case. Plaintiffs were all colonels who were also employed as civilian technicians and each had more than twenty years service with the National Guard. Each was discharged from membership in the National Guard and from their technician positions after a Vitalization Board found that they should not be retained in active military service. The court declined to review the decision, finding that plaintiff's due process claims were tenuous; that little potential injury would result since they were only forced to honorably retire and since they would recieve full military retirement benefits; that court review would interfere with the military's performance of its vital duties; and that the military had far greater expertise to determine whether certain officers should be retained or not. *Id.* at 563.

Plaintiff, on the other hand, urges us to adopt the analysis used by the court in *Bollen* v. *National Guard Bureau*, 449 F.Supp. 343 (W.D. Pa. 1978), where, again on similar facts, the court granted review. We decline to follow *Bollen* in this case for several reasons. First, in *Bollen*, plaintiff claimed that the Vitalization Board had recommended his nonretention due to his exercise of his first amendment rights. Plaintiff makes no such allegation in this case. Second, we believe that the court misinterpreted the letter sent by the Chief of the National Guard Bureau regarding retention until age sixty of civil technicians employed prior to July 1, 1955. We find that the letter clearly states the intention to retain such technicians until age sixty only if they remain "fully qualified" under all regulations, including the regulation under which the plaintiff was recommended for nonretention.

We have concluded that we must deny plaintiff's request that we review the decision to discharge him. Plaintiff's due process claim is somewhat tenuous at best.

Plaintiff was honorably discharged with full military and civil service retirement benefits and, therefore, he will suffer little potential injury. Most importantly, we find that review of this decision would interfere substantially with the military's duty to insure that a viable armed forces are available to meet any emergency that might arise. Finally, we believe that military authorities are better equipped to make this decision. We have no basis for making a determination that an individual is suitable for retention in the armed forces.

Defendant's motion for summary judgment will be granted. Plaintiff's complaint will be dismissed.

It Is So Ordered

/s/ Robert E. DeMascio
United States District Judge.

Dated: March 29, 1983

APPENDIX C

OPINION

(United States Court Of Appeals
For The Sixth Circuit)

(Filed March 23, 1984)

(Raymond J. Even, Plaintiff-Appellant, v. National Guard Bureau and John A. Johnson, Defendants-Appellees — On Appeal from the United States District Court for the Eastern District of Michigan; Docket No. 83-1319)

Before: Engel and Martin, Circuit Judges, and Weick, Senior Circuit Judge.

PER CURIAM. Raymond J. Even appeals from an order of the United State District Court for the Eastern District of Michigan dismissing his complaint and granting the National Guard Bureau's motion for summary judgment.

The appellant contends that the circumstances of his discharge from the position as a colonel and a civil service technician in the Michigan Air National Guard violated his right to due process. Under Air National Guard Regulation 36-06, all officers with 20 years or more of service are subject to annual review for retention or separation by a Vitalization Board. Officers under review may only send a letter to the Board and have no right to appear before the Board, to present evidence, to confront witnesses or to recieve written findings from the Board. In July of 1981, pursuant to the Vitalization Board's recommendation, Colonel Even was honorably discharged from the Michigan Air National Guard, which also resulted in the automatic termination of his position as a civilian technician, 32 U.S.C. § 709(e) (1976). This action followed.

On appeal, Colonel Even argues that the district court erred in utilizing the test of *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1977), to determine that the Board's recommendation was a "military decision" and hence was nonreviewable. Colonel Even further contends that he has a property interest, protectable under the Due Process clause of the Fifth Amendment, in his continued military and civilian employment. He relies primarily on a letter dated January 24, 1973 from the Air Force Chief of Staff to the Secretary of the Air Force which indicated that technicians who were hired prior to July 1, 1955 would not be separated from the National Guard until age 60, so long as they remained fully qualified.

Upon consideration, we are not persuaded that the communication from the Chief of Staff of the Air Force to the Secretary of the Air Force was sufficient under the circumstances to create an expectation of employment amounting to a property interest protectable under the Due Process clause of the Fifth Amendment. As Judge DeMascio noted, "the letter clearly states the intention to retain such technicians until age 60 only if they remain 'fully qualified' under all regulations, including the regulations under which (Colonel Even) was recommended for non-retention." *Even* v. *National Guard Bureau*, No. 82-71970, slip op. at 5 (E.D. Mich. Mar. 29, 1983). Thus, Colonel Even's severance from the National Guard did not require the procedural safeguards which would other wise attend the termination of a property interest in the form of a legitimate expectation of continued employment. *See Perry* v. *Sindermann*, 408 U.S. 593, 599-603 (1977).

Also, we do not believe the district court erred in applying the test enunciated by the Fifth Circuit in *Mindes* v. *Seaman*, 453, F.2d 1977 (5th Cir. 1977). Accordingly,

The judgment of the district court is Affirmed.

APPENDIX D

ORDER

(United States Court Of Appeals
For The Sixth Circuit)

(Filed May 3, 1984)

(Raymond J. Even, Plaintiff-Appellant v. National Guard Bureau and John A. Johnston, Defendants-Appellees — No. 83-1319)

Before: Engel and Martin, Circuit Judges;
WEICK, Senior Circuit Judge.

Appellant having filed a petition for rehearing with this court, and this court having considered said petition and finding no issues presented which have not been previously considered.

It Is Ordered that the petition for rehearing be and it is hereby denied.

Entered By Order Of The Court

/s/ John P. Hehman
Clerk

APPENDIX E

AIR NATIONAL GUARD REGULATION 36-06

(Supersedes ANGR 36-06, 23 January 1976. For Summary of Revised, Deleted, or Added Material, see Signature Page.)

OPR: NGB/DPM (LT COL JOHN HAWTHORNE)
WRITER-EDITOR: DOREEN M. WHITE

APPROVED: MG LA VERNE E. WEBER, USA
DISTRIBUTION: B

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS US AIR FORCE
WASHINGTON DC 20330

ANG REGULATION 36-06
7 OCTOBER 1977

Officer Personnel

SELECTIVE RETENTION OF AIR NATIONAL GUARD OFFICER PERSONNEL

This regulation outlines the procedures for establishment and conduct of advisory boards in the Air National Guard program for selective retention of officers beyond 20 years of qualifying service for retired pay. The word "he" as used in this regulation is intended to include both male and female, unless otherwise indicated.

	Paragraph
Terms Explained	1
Policy	2
Criteria	3
Procedures	4
Appointment of Advisory Board	5
Composition of Advisory Board	6
Organization of Advisory Board	7
Communications for Advisory Board	8
Personnel Data for Advisory Board	9
Procedures for Conducting Advisory Board	10
Actions on Advisory Board Reports	11
Separation for Other Reasons	12
Administrative Actions	13

Attachments Page
1. Letter Format for Notification of Controlled Attrition and Selective Retention in ANG Status 5
2. Special Order Format for Appointment of Advisory Board Membership 6
3. Advisory Board Report Format 7
4. Minority Report Format 8
5. Roster Format "Officers Recommended for-Retention" 9
6. Roster Format "Officers Not Recommended for Retention" 10
7. Letter Format "Selective Retention in ANG Status" (selected) 11
8. Letter Format "Selective Retention in ANG Status" (not selected) 12

1. Terms Explained:

a. Officer. For the purpose of being considered for retention under this regulation, the term "officer" includes all commissioned officers and warrant officers of the Air National Guard, including Air Technicians, except for adjutants general, assistant adjutants general, and general officers.

b. Qualifying Service Creditable for Retired Pay. Combined total of commissioned, warrant, and enlisted service, which is creditable for retired pay under chapter 67 of Title 10, United States Code, including service with other DOD components.

2. Policy. Membership in the Air National Guard of the United States is not an inherent right of any individual. It is a privilege and confers upon an individual an obligation to serve in the active military service in the event of mobilization or emergency,or at such other times as the national security may require. A continuing program of vitalization of the Air National Guard is es-

sential to avoid loss of combat readiness in a maturing force. Lack of promotion possibility and stagnation in the senior grades preclude providing for progression of qualified officers into positions of greater responsiblity at the proper phase-points of their careers. To accomplish this program of officer development, all ANG commissioned officers and warrant officers with over 20 years of qualifying service for retirement will be reviewed each year for consideration of retention or separation. This program will be achieved by controlled attrition and selective retention of officers qualified for retirement under chapter 67 of Title 10, United States Code.

a. A board of officers will be appointed by the State Adjutant General each calendar year for the purpose of making recommendation for the retention or separation of officers in the Air National Guard of that State. A single board may consider all officers or separate boards may be convened to consider officers by grades.

b. Boards may be convened at any time during the calendar year, but must be held in sufficient time to provide for reports to be received by the Chief, National Guard Bureau on or before 31 October.

c. Except as provided in paragraphs 6b and 13c, consideration under this regulation is mandatory for every eligible officers.

3. *Criteria.* Officers being considered for retention will meet the following criteria:

a. Must have accrued 20 or more years of service required to qualify for retired pay at age 60 on or before the date the board convenes. Officers previously selected for retention under any authority, including those retained past mandatory removal date under the provisions of sections 8848b, 8848c, and 8851c of Title 10, United States Code, will be included and again considered.

b. Must have been verified as being eligible for retired pay at age 60.

c. Are physically qualified for worldwide assignment. Prior to consideration by a board convened under this regulation, an officer whose last physical examination was conducted more than 1 year before the date the board convenes and required waiver of any factor will be given a new physical examination. Waivers granted more than 1 year before the date the board convenes must be reevaluated. In the event the waiver is revalidated by the National Guard Bureau, officer will then be considered by the board.

4. *Procedures:*

a. The Chief National Guard Bureau will, not later than 31 January of each year, furnish each Adjutant General a listing of all officers under his jurisdiction who are certified as having 20 years of qualifying service creditable for retired pay.

b. The Adjutant General will verify that the officers listed meet the criteria specified above and will add to the listing any officers certified subsequent to production of the listing. He will send an informative letter on "controlled attrition and selective retention in the Air National Guard" to each officer concerned (attachment 1). NOTE: This letter and other sample letters attached to this regulation may be modified to fit local circumstances.

5. *Appointment of Advisory Board.* The board will be appointed by the Adjutant General of the State by composed order and addressed directly to the individuals appointed (attachment 2).

6. *Composition of Advisory Board.* The board will be composed of not less than three commissioned officers with voting authority. Members may be selcted from the Air

National Guard, and with the concurrence of the commander concerned, from other components of the Air Force. The majority of the members will be from the Air National Guard. Tenure of office officers, other than the Adjutant General, are eligible to serve. The Adjutant General may not serve as a member of the board. All board members serve in their federally-recognized grade. Adjutants General may make arrangements for officers from outside their State to serve on the board.

a. The members of the board should possess wide command, management, and technical experience. Board members should be senior in federally-recognized grade to those being considered. As a minimum, the president of the board must be senior in grade to all officers being considered, and all board members must be senior in rank to the highest ranking officer being considered.

b. Members of the advisory board will be selected by the Adjutant General. His action to appoint the board serves as approval for retention of those board members who are officers of the ANG under his jurisdiction, and they need not be considered by the board.

7. Organization of Advisory Board. The senior member of the board (in federally-recognized grade) will be appointed president of the board. The junior member will be designated recorder, or, at the option of the Adjutant General, an additional oficer, without vote, may be appointed to the board to act as recorder.

8. Communications for Advisory Board.

a. The individual being considered for selective retention will be notified of pending action.

b. An individual being considered for selective retention may write a letter to the advisory board inviting attention to any matter of record concerning himself that he feels important in the review of his record.

c. Letters of commendation or appreciation will be forwarded through channels to the State Adjutant General for referral to the advisory board prior to the convening date of the board.

d. Unit commander impact statement identified in paragraph 10 will be submitted to the board president before the convening of the board. Statements will be forwarded through command channels, and comments may be added at each level of command if appropriate.

e. Unsolicited communications that contain criticism or reflect upon the character, conduct, or motives of any officer will not be given to the advisory board.

9. Personnel Data for Advisory Board. Prior to convening the board, personnel files of each officer being considered will be screened to ensure the following information is included:

a. Verfication of 20 years service for retirement.

b. Date last physical completed.

c. Current physical waiver (if applicable).

Note: List of officers to be considered by the board will be matched against the listing furnished by the National Guard Bureau at least 30 days prior to the anticipated date of the board.

10. Procedures for Conducting Advisory Board. The board will assemble at the time and place designated by the president and proceed as follows:

a. The order appointing the board will be read.

b. The following oath will be administered to the members by the recorder.

> "You (identify each member by grade and name) do swear (or affirm) that you will faithfully, without prejudice or partiality, and having in view

both the special fitness of individuals and the efficiency of the Air National Guard, perform duties imposed upon you, and further that you will not divulge the proceedings or results of this board except to proper authority. So help you God."

c. The following oath will be administered to the recorder by the president of the board:

"You (identify by grade and name) do swear (or affirm) that you will faithfully, without prejudice or partiality, and having in view both the special fitness of individuals and the efficiency of the Air National Guard, perform duties imposed upon you as a member and recorder of this board, and further that you will not divulge the proceedings or results of this board except to proper authority. So help you God."

d. The board will review all documents and make an evaluation of the future benefits that can be expected to accrue to the Air National Guard from the continued service of each officer it considers. When the capability of a military unit will be affected by the loss of an officer being considered, recommendations from appropriate commanders should be included in the record before the board.

e. In arriving at an evaluation, the board should consider but not be limited to the following:

(1) Demonstrated performance and potential as reflected by the officer's effectiveness reports, training reports and letters of commendation.

(2) The availability of the individual for military activities in light of the demands of his civilian occupation.

(3) Past record of interest in and dedication to the Air National Guard.

(4) Status with regard to Air Technician retirement eligibility.

(5) Rated capability and potential as a crew-member in future years (rated only).

(6) Availability of replacement officer with less service who may be lost due to mandatory promotion if high grade vacancies do not exist.

(7) The ratio of officers in an age or service bracket as relates to maintaining an age/grade/service balanced force.

(8) Growth potential for replacing present leaders.

(9) Latest report of medical examination and physical fitness.

(10) Other factors bearing on a plan for assuring a viable combat ready military unit in future years.

f. The recommendations of the board are advisory only. Nevertheless, the members of the board must be aware that their recommendations will largely determine which officers are retained.

11. Actions on Advisory Board Reports:

a. Board:

(1) Other than the reports outlined in (2) and (3) below, no record of board proceeding will be prepared.

(2) A report of the board actions and recommendations will be submitted to the State Adjutant General for approval. (attachment 3).

(3) Any member of the board who disagrees with the recommendations of the majority of the board may submit a minority report. The member will sign both

minority report and the board proceedings, indicating on the board proceedings that the minority report is being submitted as an attachment (attachment 4).

b. State Adjutant General:

(1) The State Adjutant General will review the recommendations of the advisory Board, including minority reports, and may approve or disapprove any specific recommendations.

(2) Upon the conclusion of his review the Adjutant General will makes a report to the Chief, National Guard Bureau to the effect that selective retention review of the eligible officers of his State has been completed and that he approves retention or nonretention of the listed officers and warrant officers (attachments 5 and 6). Withdrawal of federal recognition will be effective not earlier than the last day of the second month following the date of the Adjutant General's report to the National Guard Bureau. The Adjutant General may specify a later date for withdrawal of Federal recognition, but in no case later than 31 December of the current year.

(3) The Adjutant General will notify each officer concerned of the determination made as to his retention or separation (atchs 7 and 8).

c. Chief, National Guard Bureau:

(1) The Chief, National Guard Bureau will publish orders withdrawing Federal recognition of all officers not recommended for retention. The Adjutant General will be provided copies of the order withdrawing Federal recognition and will take necessary action to discharge the officer from the State and transfer him in grade to the Air Force Reserve in accordance with ANGR 36-05.

12. Separation for Other Reasons. This regulation in no way precludes initiation of action to separate an officer as specified in ANGR 36-05 or 36-014 before the effective date of discharge under this regulation. If action is initiated to separate an officer for other reasons, separation under this regulation will be delayed until that action is completed.

13. Administrative Actions. If through administrative error an eligible officer is not considered as required by this regulation, or if the action taken as to any officer under this regulation is later set aside by competent authority, the Chief, National Guard Bureau may take one of the following actions:

a. Request that the Adjutant General concerned reconvene the board for the purpose of considering or reconsidering the affected officer.

b. Request that the Adjutant General concerned convene a new board for the purpose of considering or reconsidering the affected officer.

c. Waive, for the year in question only, the requirement that the affected officer be considered under this regulation. This action will be taken only when the Chief, National Guard Bureau determines that it is clearly required in the interest of justice and fairness, or that the passage of time makes it impractical to consider or reconsider the officer for the year in question before he is considered in due course for the following year.

By Order Of The Secretary Of The Air Force

Official
La Vern E. Weber, Major General, USA
Chief, National Guard Bureau

Robert Neitz, Colonel, USAF
Executive, National Guard Bureau

Summary Of Revised, Deleted, Or Added Material
This regulation provides revised guidance on etablishing and conducting selective retention advisory boards. It deletes the requirement for general officers to be considered by the board and adds authorization for tenure of office officers to serve on the board. The schedule for conducting the board is revised to provide the Adjutant General additional flexibility. Discharge provisions are changed to allow for separation at a date determined by the Adjutant General.

APPENDIX F

PL 85-861, § 28, 72 STAT. 1562 (1958) (UNCODIFIED)

Notwithstanding chapter 863 of title 10, United States Code [10 U.S.C. §§ 8841 *et seq.*], a reserve officer who became a civilian employee of the Air National Guard before July 1, 1955, may not, before becoming 60 years of age and while so employed and without his consent, be removed from an active status by reason of any provision for mandatory promotion in chapter 837 of title 10, United States Code [10 U.S.C. §§ 8351 *et seq.*], except for cause or physical disability, or by reason of being twice passed over for promotion to the grade of captain, major, or lieutenant colonel.

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FILED
NOV 19 1984
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-168

In the Supreme Court of the United States

OCTOBER TERM, 1984

RAYMOND J. EVEN, PETITIONER

v.

NATIONAL GUARD BUREAU AND
JOHN A. JOHNSTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

13 pp

TABLE OF AUTHORITIES

Page

Cases:

Board of Regents v. *Roth*, 408 U.S. 564 5

Coalition for Responsible Regional Development v. *Brinegar*, 518 F.2d 522 5

Dillard v. *Brown*, 652 F.2d 316 6

Mindes v. *Seaman*, 453 F.2d 197 ..... 3, 6

Nieszner v. *Orr*, cert. denied, 460 U.S. 1022 6

Norris v. *United States*, 423 F.2d 695, cert. denied, 400 U.S. 838 5

Olim v. *Wakinekona*, 461 U.S. 238 5

Tennessee v. *Dunlap*, 426 U.S. 312 2

Thompson v. *Stetson*, cert. denied, 454 U.S. 823 5

United States v. *Summit Fidelity & Surety Co.*, 408 F.2d 46 5

Constitution, statutes and regulations:

U.S. Const. Amend. V, Due Process Clause 4, 5

32 U.S.C. 709(b) 2

32 U.S.C. 709(e)(1) 2

Pub. L. No. 85-861, § 28, 72 Stat. 1562 6

Page

Constitution, statutes and regulations—Continued

Air National Guard Regulations (A.N.G.R.):

§ 36-05 (Aug. 15, 1974) 1, 5, 6

para. 13.a(10) 1

§ 36-06 (Oct. 7, 1977) 1, 5, 6

para. 2 1

para. 11.b(1) 5

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner challenges the decision of the Michigan Air National Guard not to retain him as a member of the Guard.

1. Air National Guard Regulations (A.N.G.R.) establish a program of "selective retention" of officers who have served more than 20 years and are eligible for retirement pay. A.N.G.R. 36-05 (Aug. 15, 1974) provides in part that "[a]ll officers with 20 years of Federal service qualifying for retirement pay * * * will be discharged unless specifically recommended for retention by [the] appropriate board in accordance with ANGR 36-06" (para. 13.a(10); C.A. App. 68a). A.N.G.R. 36-06 (Oct. 7, 1977) (Pet. App. E1-E11) explains the selective retention policy as follows (para. 2; Pet. App. E2-E3):

> Membership in the Air National Guard of the United States is not an inherent right of any individual. It is a privilege and confers upon an individual an obligation to serve in the active military service in the event of mobilization or emergency, or at such other times as the national security may require. A continuing program of vitalization of the Air National Guard is essential to avoid loss of combat readiness in a maturing force. Lack of promotion possibility and stagnation in the senior grades preclude providing for progression of qualified officers into positions of greater responsibility at the proper phase-points of their careers. To accomplish this program of officer development, all ANG commissioned officers and warrant officers with over 20 years of qualifying service for retirement will be reviewed each year for consideration of retention or separation. This program will be achieved by controlled attrition and selective retention of officers * * *.

In 1981, after review by a Vitalization Board, the Michigan Air National Guard determined not to retain petitioner, who had served in the Guard since 1947. Petitioner was honorably discharged from the Guard. Pet. App. C1.[1] Petitioner had an opportunity to send a letter to the Vitalization Board when it was considering whether to recommend his retention but he had no right to appear in person before the Board (*ibid.*).

2.a. Petitioner then brought this action in the United States District Court for the Eastern District of Michigan, contending that the discharge procedure denied him due process. In alleging that he had an entitlement to continued

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[1]This discharge automatically terminated petitioner's employment as a civilian technician with the Guard (Pet. App. C1). See 32 U.S.C. 709(b) and (e)(1); *Tennessee* v. *Dunlap*, 426 U.S. 312 (1976).

service in the Guard, petitioner relied on a letter dated January 24, 1973 and approved by the Secretary of the Air Force, a copy of which is reproduced below (App., *infra*, 1a-2a).

On cross motions for summary judgment, the district court ruled against petitioner (Pet. App. B1-B4). The court noted that petitioner's "only claim is that [the] decision to discharge him violated his constitutional right to due process" (*id.* at B2). The district court stated that, in determining whether to "review" this claim, it would consider the four factors specified by *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971):

> (1) "[t]he nature and strength of plaintiff's challenge to the military determination"; (2) "[t]he potential injury to the plaintiff if review is refused." (3) "[t]he type and degree of anticipated interference with the military function;" and (4) "[t]he extent of anticipated interference with the military function."

Pet. App. B2, quoting 453 F.2d at 200 (brackets added by the district court). The district court then stated that petitioner mischaracterized the January 24, 1973 letter in suggesting that it gave him an entitlement to be retained in the Guard (Pet. App. B3): "We find that the letter clearly states the intention to retain such technicians until age sixty only if they remain 'fully qualified' under all regulations, including the regulation under which [petitioner] was recommended for nonretention." The court then reasoned as follows (*id.* at B3-B4):

> We have concluded that we must deny [petitioner's] request that we review the decision to discharge him. [Petitioner's] due process claim is somewhat tenuous at best. [Petitioner] was honorably discharged with full military and civil service retirement benefits and, therefore, he will suffer little potential injury. Most importantly, we find that review of this decision would

> interfere substantially with the military's duty to insure that a viable armed forces are available to meet any emergency that might arise. Finally, we believe that military authorities are better equipped to make this decision. We have no basis for making a determination that an individual is suitable for retention in the armed forces.

b. The court of appeals affirmed (Pet. App. C1-C2). It first held that petitioner's interest in being retained in the Guard was not protected under the Due Process Clause (*id.* at C2; citation omitted):

> [W]e are not persuaded that the communication from the Chief of Staff of the Air Force to the Secretary of the Air Force was sufficient under the circumstances to create an expectation of employment amounting to a property interest protectable under the Due Process clause of the Fifth Amendment. As [the district court] noted, "the letter clearly states the intention to retain such technicians until age 60 only if they remain 'fully qualified' under all regulations, including the regulations under which [petitioner] was recommended for non-retention." Thus, [petitioner's] severance from the National Guard did not require the procedural safeguards which would otherwise attend the termination of a property interest in the form of a legitimate expectation of continued employment. See *Perry* v. *Sindermann,* 408 U.S. 593, 599-603 [(1972)].

The court of appeals then briefly remarked (Pet. App. C2): "Also, we do not believe the district court erred in applying the test enunciated by the Fifth Circuit in *Mindes* v. *Seaman* * * *."

3.a. Petitioner's principal contention (Pet. 6-9) is that this Court should decide whether his procedural due process claim is reviewable. But even if petitioner were correct in asserting that his claim is reviewable, he would not be

entitled to relief. Both courts below — the district court implicitly,[2] and the court of appeals explicitly — rejected petitioner's claim on the merits, and their conclusion was correct.[3]

Petitioner may invoke the protections of the Due Process Clause only if his interest in continued membership in the Guard is a protected "liberty" or "property" interest. Petitioner makes no claim that A.N.G.R. 36-05 or 36-06 creates such an interest, and no such claim would be plausible; the decision whether to retain a member of the Guard is made by the State Adjutant General on the recommendation of the Vitalization Board (A.N.G.R. 36-06, para. 11.b(1)), and the regulations "place no substantive limitations on [the Adjutant General's] discretion" (*Olim* v. *Wakinekona*, 461 U.S. 238, 249 (1983); see *Board of Regents* v. *Roth*, 408 U.S. 564, 577-578 (1972)). They therefore create no liberty or property interest.

Petitioner instead relies on the January 24, 1973 letter.[4] But petitioner suggests no reason for believing that that

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[2]The district court stated that petitioner's claim was "somewhat tenuous at best" (Pet. App. B3) and it specifically found that the sole basis of petitioner's claim — the January 24, 1973 letter — did not confer on petitioner an interest protected by the Due Process Clause (*ibid.*).

[3]In *Thompson* v. *Stetson*, cert. denied, 454 U.S. 823 (1981), the Court declined to consider a claim by a member of a state Air National Guard that his nonretention decision violated the Due Process Clause. Petitioner's claim on the merits is indistinguishable. We are serving counsel for petitioner with a copy of our memorandum in opposition in *Thompson* (No. 80-1887).

[4]Petitioner also discusses (Pet. 4) a 1970 opinion letter by the legal adviser to the National Guard Bureau. As petitioner acknowledges (Pet. 4 n.*), this letter was not a part of the district court record and was not submitted to the court of appeals until after its decision. It therefore should not be considered by this Court. See, *e.g.*, *Coalition for Responsible Regional Development* v. *Brinegar*, 518 F.2d 522, 527 (4th Cir. 1975); *Norris* v. *United States*, 423 F.2d 695 (9th Cir.), cert. denied, 400

letter — which only "recommend[s]" certain actions and does not modify any regulation — should take priority over the regulations that specifically govern non-retention. Moreover, the letter is, on its face, not addressed to officers subject to the non-retention policy of A.N.G.R. 36-06; instead, the letter recommends that the Air Force not frustrate expectations that may have arisen because of Pub. L. No. 85-861, § 28, 72 Stat. 1562 (Pet. App. F1), which exempts certain officers from removal that would otherwise be required by certain "provision[s] for mandatory promotion in chapter 837 of title 10, United States Code * * *." As the courts below noted, the letter specifically does not recommend the retention of members of the Guard who are not otherwise "fully qualified," and petitioner was determined not to be qualified for retention under A.N.G.R. 36-05 and 36-06.[5]

U.S. 838 (1970); *United States* v. *Summit Fidelity & Surety Co.*, 408 F.2d 46, 48 (6th Cir. 1969). The opinion has been in existence for 14 years, and there is no reason for an exception to the well-established rule that evidence must be submitted to the trial court to be considered on review.

In any event, the opinion letter is just that — a statement of the legal adviser's opinion — and does not purport to modify any regulations. Moreover, it appears to be addressed to the same question as the January 24, 1973 letter (see page 6, *infra*).

[5]Petitioner asserts (Pet. 8-9) that there is a conflict between the decision below and *Dillard* v. *Brown*, 652 F.2d 316 (3d Cir. 1981), over the extent to which military determinations are reviewable. As we explained in our memorandum in opposition in *Nieszner* v. *Orr*, cert. denied, 460 U.S. 1022 (1983) (No. 82-1007), the differences between the Third Circuit's approach in *Dillard* and the approach of those courts of appeals that have followed *Mindes* v. *Seaman*, *supra*, may be more apparent than real. (We are serving counsel for petitioner with a copy of our memorandum in opposition in *Nieszner*.) In any event, all *Dillard* purports to require is that a court review certain military determinations on the merits instead of considering them nonreviewable (see 652 F.2d at 323), and the courts below rejected petitioner's claim on the merits. Petitioner therefore cannot invoke any conflict as a reason for review by this Court.

b. Finally, petitioner, citing black letter law on the granting of summary judgment, asserts that there were material issues of fact in this case. But petitioner himself moved for summary judgment, and he does not identify any factual evidence in the record that would enable him to show that he has a protected property interest. This fact-bound claim therefore plainly does not merit review by the Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1984

DOJ-1984-11

APPENDIX

DEPARTMENT OF THE AIR FORCE
OFFICE OF THE CHIEF OF STAFF
UNITED STATES AIR FORCE
WASHINGTON, D.C. 20530
24 JAN 1973

SUBJECT: Extension of Officer Air Technicians Employed Prior to 1 July 1955

TO: SAF/OS

1. On 1 July 1955, the effective date of ROPA, the Air National Guard had 656 officers including 12 generals and 53 colonels employed as air technicians. Attrition and promotions have reduced the total pre-1955 technicians to 339 but increased the number of generals to 20 and colonels to 134. These officers have been under the impression since 1 July 1955 that Section 28, Public Law 85-861 assured them of retention in their civilian employment until age 60. This opinion also prevailed in the National Guard Bureau and the Air Force.

2. On 13 October 1972, AF/JAC ruled that PL 85-861 did not extend the authority for retention above the grade of lieutenant colonel but pointed out that such authority was delegated to the Secretary of the Air Force in 10 USC, 8851(c).

3. In light of the policy followed over the past 17 years under the presumed authority of PL 85-861, I recommend that where the officer is fully qualified to hold his military position and properly performing his technician job, he should be retained in his technician employment. I further recommend that this determination be made by the Secretary of the Air Force with

regard to general officers and by the Chief, National Guard Bureau for officers of other grades.

/s/ [John D. Ryan]

Chief of Staff

Approved:

/s/ [Robert Seamens]

Secretary of the Air Force